In the Supreme Court of the United States

No. 77-1393

UNITED STATES OF AMERICA,
Respondent,

vs.

ANTHONY J. CARDARELLA,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner, Anthony J. Cardarella, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This case was submitted to the United States Court of Appeals, Eighth Circuit, on January 9, 1978. The opinion of the Court of Appeals affirming the convictions was entered on February 7, 1978 (Appendix A). Appellant's motion for rehearing was denied on March 1, 1978 (Appendix B). Appellant's petition for Stay of Mandate was granted on March 14, 1978 (Appendix C).

JURISDICTION

The conviction upon which this Writ of Certiorari is sought was affirmed by the opinion of the Court of Appeals filed February 7, 1978; and order denying rehearing entered March 1, 1978; and order granting a Stay of Mandate entered March 14, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the defendant was denied the right to confront witnesses against him, the right to fair trial before an impartial jury, the right to due process of law, and the right to effective assistance of counsel, when the trial Court failed to sustain an objection and refused to grant a mistrial when the prosecuting attorney asked the defendant on cross-examination if the defendant had not admitted guilt privately to the prosecuting attorney, when no such statement was in evidence or was ever offered into evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, . . ., nor be deprived of life, liberty or property, without due process of law. . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him; to have . . ., and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Defendant Anthony J. Cardarella was first indicted in a nine count indictment filed in December of 1976. Count One of that Indictment alleged that from June of 1972 through December, 1974, the Defendant (hereinafter Cardarella) conspired with a Raymond L. Tolliver, and Allen Gardner and a Richard Stevenson (hereinafter Tolliver, Gardner and Stevenson) to violate Section 2314 and 2315 of Title 18 United States Code, by transporting and receiving stolen goods in excess of five thousand dollars in value.

Counts II and III charged firearms violations, but were dismissed by the Government at the close of its case.

Counts IV, VI and VIII, charged the Defendant with receiving firearms from interstate commerce after having been convicted of a felony (18 U.S.C., Section 922(h)).

Counts V and VII charged the Defendant with receiving these same guns knowing them to be stolen (18 U.S.C., Section 922(j)).

Count IX charged Defendant with aiding and abetting Tolliver in becoming an illegal firearms dealer, in violation of 18 U.S.C., Section 922(a)(1).

The second indictment charged Defendant in Counts I and III with causing a Richard L. Gile (hereinafter Gile) to transport stolen goods in excess of five thousand dollars in interstate commerce.

Counts II and IV of that indictment charged Defendant with receiving those same goods from Gile.

Prior to the trial of this case, Defendant filed a motion to strike surplusage from the first indictment, with specific reference to detailed description of Defendant's prior offense. The Honorable William Becker ordered this description stricken from the indictments since it was unnecessary and would be highly prejudicial if read to the jury. In addition, Defendant filed a motion to suppress, a motion to sever conspiracy and the charges involving violation of 18 U.S.C., Section 2314 and Section 2315 from the firearms violations for trial, and a motion to dismiss for prosecutorial misconduct in refusing to inform the Grand Jury of Defendant's request to take a polygraph examination concerning the charges then being investigated. Each of these motions were denied.

The evidence at trial with regard to the first indictment consisted of testimony by Richard Lee Stevenson and Allen Charles Gardner, unindicted co-conspirators, to the effect that they had stolen a large number of items, including certain of the firearms in the indictment, and had delivered or seen or heard Raymond Tolliver deliver such items to the Appellant. There was some evidence that the firearms named in the indictment had been stolen. There was testimony by employees of the Defendant that items other than firearms were brought to Defendant's place of business.

Concerning the second indictment, there was only the testimony of Richard Lee Gile, that he had, on numerous occasions, stolen items and brought them to the Defendant.

In addition to testimony concerning the allegations of the indictments, there were numerous witnesses allowed to testify concerning other unrelated deliveries of allegedly stolen items for the ostensible purpose of showing Defendant's intent.

Defendant's evidence consisted of a number of witnesses explaining the huge volume of his purchases from record distributors and the informal manner in which such purchases would be delivered. In addition, the Appellant took the stand to testify that he had, upon occasion, given money to persons named in the indictment, but that he had not received any goods from them that he knew to be stolen; that he had never received any firearms from them under any circumstances, and that the allegations of the indictments were simply untrue.

Following Defendant's testimony, the prosecuting attorney cross-examined. During this cross-examination he asked the Defendant if it were not true that the Defendant has admitted privately to him, on the occasion of a pretrial hearing, that the Defendant was, in fact, receiving stolen goods. At this point the Defendant's attorney objected and requested a mistrial, which was denied.

Following Defendant's testimony, the defense rested as did the prosecution, and the matter was submitted, after argument and instructions to the jury. The jury returned a verdict of guilty on all counts submitted to it. Defendant's motion for a new trial was denied, Appellant was sentenced and from that judgment and sentence, takes this appeal.

REASONS FOR GRANTING THE WRIT

The crucial issue involved in Defendant's appeal is whether the trial court erred by refusing to grant the request for mistrial, when the Prosecuting Attorney asked the Defendant on cross-examination if the Defendant had not admitted his guilt privately to the Prosecutor, when no such statement by the Appellant was in evidence or ever offered into evidence. The problem arose from the following exchange:

> On cross-examination, Defendant was asked:
>
> "Q. Now, it is true, isn't it, Mr. Cardarella, that you have sold some records through your shop that were boosted or stolen or that you had reason to believe were boosted or stolen?
>
> A. I don't think I have, sir.
>
> Q. Did we have a conversation during a hearing here on 6 April of 1977 concerning whether or not you were dealing in boosted items?
>
> A. I don't remember that.
>
> Q. Do you recall telling me that you did sell boosted items but it wasn't in the quantities I thought?
>
> A. I don't remember that, either, sir.
>
> Mr. Gallipeau: Your Honor, I'm going to object to this for several reasons, if I may."

The Defendant objected and moved for a mistrial, but both the objection and motion were denied and the Prosecuting Attorney was allowed to resume his questioning. No evidence was ever offered that any such statement by the Defendant had ever been made.

Such behavior by a Prosecuting Attorney is improper and unethical. DR7-106(C)(3), of the Code of Professional Responsibility, provides:

> "In appearing in his professional capacity before a tribunal a lawyer shall not: . . . (3) assert his personal knowledge of the facts in issue except when testifying as a witness."

But it is not merely a question of unethical behavior, but a question of denying the right of the defendant to confront a witness against him, allowing unsworn assertions of fact to be placed before the jury coming from the mouth of the representative of the United States of America.

Although the trial of Defendant's case took a considerable period of time, and involved a large number of individual charges, the evidence boiled down to a test of the credibility of the defendant against the credibility of a series of government informers, each of whom was shown to be receiving some benefit from his testimony. To this was added the unsworn testimony of the Prosecuting Attorney representing the United States of America, that the defendant had made a confession.

There are clearly some activities by the United States Attorney that cannot be cured, save by granting a mistrial. *Throckmorton* v. *Holt*, 180 U.S. 552 (1901). This is because of his unique position:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very defi-

> nite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

Asserting the facts of the question, and utilizing facts not in evidence, it is clearly improper and prejudicial. *Berger*, supra; *Reichert* v. *United States*, 395 F.2d 278 (D.C. Cir., 1968); *McMillan* v. *United States*, 363 F.2d 165 (5th Cir., 1966); *King* v. *United States*, 372 F.2d 383 (D.C. Cir., 1967); *United States* v. *Meeker*, 558 F.2d 387 (7th Cir., 1977).

Here we have the worst possible abuse of the government's right to cross-examine a criminal defendant. In the guise of a question, the federal prosecutor asserts an extra-judicial confession was made to him, personally, by the defendant. Had such evidence been offered by the government, by witness under oath, it would have been subject to challenge and possible suppression on Fifth and Sixth Amendment grounds. Certainly, one making such a statement would be subjected to cross-examination. Against such a bare assertion by the prosecutor, the criminal defendant has neither the opportunity to cross-examine, nor the opportunity to suppress.

It should also be noted that in addition to violating the Defendant's Fifth and Sixth Amendment rights concerning possible suppression of such a statement and the right to cross-examine the maker, the assertion of such a statement without giving prior notice to the Appellant of the existence of such a statement or the government's in-

tent to use it is in violation of the pre-trial order entered by the Honorable Calvin K. Hamilton, United States Magistrate, at Defendant's omnibus hearing. At that time statements allegedly made by the Defendant were ordered to be revealed to Appellant's counsel. Such a duty to disclose, of course, is a continuing one. The obvious purpose of that order was to avoid exactly the situation which developed, wherein the allegation of such a statement was made, and made some three weeks prior to Defendant's cross-examination, is made for the first time in the presence of the jury.

Nor is this an isolated incident, no prosecutorial misconduct quickly suppressed by a trial court admonition. Early in the same day, Mr. Helfrey had asked:

> "Q. Do you engage in gambling of any sort?
>
> A. Yes sir, I have.
>
> Q. And are you successful at gambling or not successful?
>
> Mr. Gallipeau: I object to this line of questioning. It is far beyond the scope of direct examination. It is not relevant to this case.
>
> Mr. Helfrey: I think it is pertinent to this case. We have testimony from numerous witnesses that Mr. Cardarella would pull out large sums of money, $1,000, $1,500.
>
> Mr. Gallipeau: I recall no such testimony but there was no question about gambling.
>
> Mr. Helfrey: If I can finish, we have that testimony. In addition we have the testimony introduced by the defense that Mr. Cardarella is a very, very large dealer in phonograph records, LP albums, and that I assume the inference could be drawn therefrom is that he didn't need to deal in stolen LP albums. The gov-

ernment feels that we can establish by records of his gambling losses that that type of thing Mr. Cardarella was a big spender, that he had large sums of money on him, that it is pertinent to the issues in this case.

Mr. Gallipeau: Your Honor, that was not an answer to my objection and that was his statement before the jury. I think it is totally improper. This issue has—

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)" (T. 1490-1491)

Appellant's motion for a mistrial was denied (T. 1492), but the Court later admonished the jury to ignore Mr. Helfrey's statements concerning gambling (T. 1500).

Moreover, the Court not only overruled Defendant's objection to the prosecutor's questions concerning the alleged "confession", but also allowed the prosecutor to resume the same questioning after the side-bar conference. (T. 1545).

The criteria for reversal is set out clearly in *Meeker*, supra (at 390, in reversing a conviction where the trial court had sustained the objection and attempting to cure the prejudice arising from such statements from the prosecutor). First, there is an invitation to the jury to convict on the basis of facts which—if true—were outside the record. This is counter to the "basic concept of fairness". *Meeker*, supra, citing *United States* v. *Grossman*, 400 F.2d 951, 956 (4th Cir., 1968).

Second, the prosecutor's statement pits the credibility of a United States Attorney against that of a defendant accused of a crime. The problem is simply stated in *Meeker*, supra:

". . . coming from the mouth of a representative of the United States, of whom the average jury expects the fairness and impartiality mentioned in *Berger*, such prejudicial questions 'carry much weight against the accused when they should properly carry none'." *Berger* v. *United States*, supra, 295 U.S. at 88, 55 S.Ct. 633.

Finally, this is not an isolated incident, quickly cured by a judicial admonition. Not only had prior improper questions been asked, but the court made no attempt to cure the prejudice. The jury was left to speculate as to the credibility of the Defendant against the credibility of an Assistant United States Attorney.

This is very important. All physical evidence in this case was subject to varying interpretation. The issues of fact facing the jury were to be settled by weighing the credibility of the Appellant (a convicted felon, but one who had later become a very successful businessman) against the word of a series of government informers—confessed thieves and addicts, each of whom received some governmental favor in exchange for his testimony. That was the balance when the prosecutor threw in the weight of his personal credibility as a representative of the United States of America, and in the guise of questions, offered testimony unsworn and subject to no challenge save upon appeal.

It is inconceivable that a prosecutor could do anything more damaging or more prejudicial to a defendant than to allege that the defendant had confessed to him the commission of the crimes charged. If this is not held to be prejudicial error, then the effect of such a holding is to announce to every prosecuting attorney that there is simply nothing—no amount of misconduct—which will be held to be sufficiently prejudicial to result in the reversal of a conviction resulting from such misconduct.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1551

United States of America,
Appellee,

v.

Anthony Cardarella,
Appellant.

Appeal From the United States District Court
for the Western District of Missouri

Submitted: January 9, 1978
Filed: February 7, 1978

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Appellant Anthony J. Cardarella challenges his jury convictions on three counts of violation of 18 U.S.C. § 922(h)(1970), for receiving firearms transported in interstate commerce after having been convicted of a felony; two counts of violation of 18 U.S.C. § 922(j)(1970), for receiving stolen guns that had moved in interstate commerce; one count of violation of 18 U.S.C. § 922(a)(1)(1970), for aiding and abetting an illegal firearms dealer; two counts of violation of 18 U.S.C. § 2314 (1970), for causing to be transported in interstate commerce stolen

merchandise valued at more than $5,000; two counts of violation of 18 U.S.C. § 2315 (1970), for receiving stolen merchandise valued at more than $5,000 that had moved in interstate commerce; and one count of conspiracy, under 18 U.S.C. § 371 (1970), to violate 18 U.S.C. §§ 2314, 2315 (1970). The district court sentenced appellant to serve five years' imprisonment and to pay $11,000 in fines. We affirm the convictions on all counts.

Cardarella does not challenge the sufficiency of the evidence supporting his conviction. Rather, he makes six separate assignments of error, four of which we discuss briefly, and the other two at more length.

I.

The four alleged errors that do not merit extended discussion are summarized by appellant as follows:

Whether the trial court erred by refusing to allow the Appellant's counsel to question Appellant concerning a polygraph examination after the prosecutor had falsely implied, before the jury, that the Appellant had refused such examination.

Whether the trial court erred by instructing the jury on conspiracy under 18 U.S.C., Section 371, but failed to instruct on the elements of the underlying substantive charges, when such substantive charges were not otherwise charged.

Whether the trial court erred by instructing the jury in response to a note from them that the jury must reach a unanimous verdict on all counts.

Whether the trial court erred by reading to the jury, a detailed description of Appellant's prior offense, when such was unnecessary, superfluous and highly prejudicial to Appellant.

With respect to the first contention, we do not read, in the prosecutor's line of questioning, an implication that the appellant refused to take a polygraph examination.[1] We also note that ordinarily polygraph results are not admissible as evidence, *United States* v. *Alexander*, 526 F.2d 161, 166 (8th Cir. 1975), nor is willingness or unwillingness to take such examination. Therefore, the district judge properly refused to allow the questioning of appellant on redirect examination concerning his willingness to take a polygraph examination related to the offense charged.

---

1. The line of questioning went as follows:

Q. Now, you mentioned yesterday concerning an investigation that occurred of you involving the sale of rifles, is that correct?

A. Yes, sir.

Q. And you indicated that you took a lie detector test.

A. Yes, sir.

Q. And you indicated that—was it Agent Moore that investigated that case?

A. Yes, sir.

Q. And were you ever arrested as a result of that investigation?

A. No, sir.

Q. Were you ever prosecuted?

A. No, sir.

Q. And you're aware, are you not, that lie detector tests are not admissible in a court of law?

A. Yes, sir.

Q. And you're aware that's because they're considered unreliable?

A. I guess that's the reason, yes, sir.

Q. And that investigation, in any event, resulted in no deprivation of your liberty in any manner, is that true?

A. Yes, sir, that's true.

From this, appellant infers that:

> The implication of that line of questioning is clear. The Appellant took and passed a polygraph examination at a prior time and was not charged; since he is now charged he must have either refused or failed such examination * * *.

Similarly, we find no error in the court's instructions to the jury. After instructing the jury on the elements of conspiracy, the court briefly reviewed the nature of the underlying offense. Later on in its instructions, when it reached the part of the indictment where the underlying offense was charged substantively, the court fully briefed the jury on the necessary elements of proof. The court was not obligated to instruct the jury twice on this matter.

In appellant's third allegation of error, he contends that the court's brief response ("Yes, you do.") to the jury's request for guidance ("Your Honor: Do we have to have a unanimous verdict on each separate count?") misled the jury. In particular, appellant states that the answer conveyed to the jury the impression that it must convict the appellant on all counts or none. We disagree. The answer, taken at face value, conveyed the understanding that an unanimous verdict was required on each separate count, and not that an unanimous verdict was required on the counts taken together, *i.e.*, guilty on all counts or no counts.

Finally, the court's accidental reading of the details of Cardarella's prior offense was not prejudicial. The judge immediately ordered the jury to disregard the previous instruction, and in this case the Government presented exceptionally strong evidence of guilt.

II.

The first substantial claim of error raised by appellant is "[w]hether the trial court erred by refusing to grant a mistrial when the prosecutor asked the appellant, in cross-examination, if the appellant had not admitted guilt privately to the prosecutor, when no such statement was in evidence or ever offered into evidence." On cross-examination, appellant was asked:

Q. Now, it is true, isn't it, Mr. Cardarella, that you have sold some records through your shop that were boosted or stolen or that you had reason to believe were boosted or stolen?

A. I don't think I have, sir.

Q. Did we have a conversation during a hearing here on 6 April of 1977 concerning whether or not you were dealing in boosted items?

A. I don't remember that.

Q. Do you recall telling me that you did sell boosted items but it wasn't in the quantities I thought?

A. I don't remember that, either, sir.

MR. GALLIPEAU: Your Honor, I'm going to object to this for several reasons, if I may.

* * *

MR. GALLIPEAU [out of hearing of the jury]: I'm going to move for a mistrial on the basis of the fact that *unless Mr. Helfrey is willing to take the stand and be cross-examined* on this matter that this raises just a terrible specter before this jury of the credibility of this defendant. [Emphasis added].

The line of questioning may be open to the charge that it is improper and unethical.[2] Nevertheless, not every error, defect or irregularity requires setting aside a criminal conviction. *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972). In cases where prosecutorial misconduct is alleged we must

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2. *See* DR 7-106(C)(3), *Code of Professional Responsibility*:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * *

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

review the facts independently to ascertain whether there has been prejudice to the defendant. *United States* v. *Splain*, 545 F.2d 1131, 1135 (8th Cir. 1976).

In this case we believe the alleged misconduct was harmless beyond a reasonable doubt. Against the background of a long trial in which the Government presented almost overwhelming evidence indicating appellant's guilt, the prejudicial effect of this incident must be deemed insignificant. *Schneble* v. *Florida, supra*, 405 U.S. at 430.

Moreover, Mr. Gallipeau's motion for a mistrial, as quoted above, was made contingent on the unwillingness of the prosecutor to take the stand and be cross-examined on his insinuations. The prosecutor, at sidebar, *did offer* to take the stand and be cross-examined on the statement; however, the defendant apparently declined the invitation. Under the circumstances, we cannot say with certainty that appellant preserved his objection for appeal.

Finally, after defendant denied the truth of the allegation, the prosecutor quickly dropped the line of questioning and never mentioned the matter again. Thus, we hold that the trial court's rejection of the mistrial motion does not constitute prejudicial error.

The second major assignment of error is broken down by appellant into several subcategories:

> Whether the trial court erred with regard to the juror, Mrs. Eggars:
>
> A. By denying Appellant's request that she be excused after expressing fear for her own safety.
>
> B. By denying Appellant's counsel the opportunity to examine her as to the cause and possible effect of such fear when a second such incident arose.

> C. By compelling Appellant to choose between allowing Mrs. Eggars to remain or forego his right to a trial by jury of twelve.
>
> D. By refusing to grant a mistrial with regard to the above.
>
> E. By failing to hold a requested evidentiary hearing on these matters on Appellant's motion for a new trial.

The basis of this objection relates to an incident involving juror Mrs. Eggars who through a communication to the court during the trial advised that she felt threatened and afraid, largely because certain individuals in the courtroom were staring at her. The court immediately held a hearing in chambers with the lawyers for both parties present. In response to questioning from the court, Mrs. Eggars indicated that she could render a fair and impartial verdict. The court then overruled the defendant's motion that Mrs. Eggars be excused, and instructed the juror not to speak to the other jurors about her fears or the case itself.

The next day of the trial, defense counsel renewed his motion to excuse the juror and asked for a second hearing in chambers. The judge denied the request for hearing but offered to excuse the juror if the defense would agree to go with an eleven-person jury in the event that another juror was lost.[3] The defense refused.

Upon completion of the trial, the defense moved for a mistrial on the ground that the defendant had been unduly prejudiced by maintaining a fearful juror on the venire. The judge denied the motion, but then dismissed

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3. One juror had already been dismissed from the case, leaving one alternate.

juror Eggars from the case, as though she were an alternate juror. Thus, the controversial juror did not take part in the jury's deliberations or verdicts.

In sum, appellant contends that he was denied a fair trial because the juror's fears spread to the rest of the jury and tainted their verdict, even though the juror was not part of the panel when it rendered the verdicts. Nothing in the record supports this conclusion. As we have already noted, the judge carefully instructed the juror not to talk about her apprehensions to the other jurors. Moreover, at numerous points in the trial, the judge admonished the jury as a whole not to talk among themselves about the case. Appellant alleges no specific instance of communication among the jurors that causes us to question the presumption of a fair and impartial jury.

Finding no prejudicial error, the convictions are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

77-1551

September Term, 1977

United States of America,
Appellee,

vs.

Anthony Cardarella,
Appellant.

Appeal from the United States
District Court for the
Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 1, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1551. September Term, 1977

United States of America,
Appellee,

vs.

Anthony Cardarella,
Appellant.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 14, 1978